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Supreme Court, U.S.
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91-1230
No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

HOUSTON LIGHTING AND POWER COMPANY,

Petitioner,

v.

THE HONORABLE JOSEPH B. MORRIS, JUDGE
(CITY OF SAN ANTONIO AND CENTRAL POWER
AND LIGHT COMPANY, REAL PARTIES IN INTEREST)

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

FINIS E. COWAN
J. GREGORY COPELAND
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

ROY Q. MINTON
MARTHA S. DICKIE
MINTON, BURTON, FOSTER
& COLLINS
1100 Guadalupe
Austin, Texas 78701

ROBERT J. HEARON, JR.*
MATTHEW G. DORÉ
MICHAEL DIEHL
SELDEN ANNE WALLACE
GRAVES, DOUGHERTY,
HEARON & MOODY
515 Congress Avenue
P. O. Box 98
Austin, Texas 78701
(512) 480-5600
(512) 478-1976

Attorneys for Houston Lighting & Power Company

* Counsel of Record

January 27, 1992

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APPENDIX A

Order of the District Court of Dallas County, Texas Compelling Arbitration

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IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
101ST JUDICIAL DISTRICT

No. 88-6923-E

HOUSTON LIGHTING AND POWER COMPANY, *et al.*,
Plaintiffs,

v.

CITY OF SAN ANTONIO, *et al.*,
Defendants.

ORDER

On the 21st day of June, 1990, came on to be heard the Original Pleas in Abatement and Applications for Order Compelling Arbitration and for Ancillary Relief of City of San Antonio and Central Power and Light Company (hereinafter "Defendants"), the Joint Supplemental Application of San Antonio and Central Power and Light Company for Order Compelling Arbitration (subject to their pleas in abatement), and Houston Lighting & Power Company's Special Exceptions to the Counterclaims of San Antonio and Central Power and Light Company (filed by them subject to their pleas in abatement and calls for arbitration); and the Court, having considered the filings of record in this case, particularly those which were the subject of the hearing, and having considered the briefs and supplemental briefs of counsel for the respective parties, and having heard and considered the

oral argument of counsel for the respective parties, is of the opinion that:

1. The South Texas Project Participation Agreement contains a valid and enforceable arbitration clause;

2. The disputes framed by the pleadings arise under the Participation Agreement and are arbitrable;

3. The Defendants' calls for arbitration have been timely and properly made;

4. The City of Austin, as a named participant, is not precluded from appointing an arbitrator; and

5. This case should be stayed pending arbitration by arbitrators appointed pursuant to Section 23.2 of the Participation Agreement.

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that the Applications of the City of San Antonio and Central Power and Light Company for an Order Compelling Arbitration are GRANTED; and it is further

ORDERED, ADJUDGED AND DECREED that this litigation is and shall be stayed pending arbitration by a single panel of arbitrators appointed pursuant to Section 23.2 of the Participation Agreement; should City of Austin, as a named participant, appoint an arbitrator, and if necessary, to make the total number of arbitrators an odd number in accordance with Section 23.2 of the Participation Agreement, then the arbitrators so appointed shall elect one additional arbitrator.

SIGNED AND ENTERED THIS 22nd day of August, 1990, at 4:50 o'clock p.m.

/s/ Joseph B. Morris
JOSEPH B. MORRIS
Presiding Judge
101st Judicial District Court
Dallas County, Texas

APPENDIX B

Order of the District Court of Dallas County, Texas Denying HL&P's Motion and Supplemental Motion for Appropriate Relief in Aid of Fair Arbitration

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IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
101ST JUDICIAL DISTRICT

No. 88-6923-E

HOUSTON LIGHTING AND POWER COMPANY, *et al.*,
Plaintiffs,

v.

CITY OF SAN ANTONIO, *et al.*,
Defendants.

ORDER

On the 24th day of January, 1991, came to be heard the Motion and Supplemental Motion for Appropriate Relief in Aid of Fair Arbitration filed by Houston Lighting & Power Company ("HL&P"). The Court, having considered the motions, supporting briefs, and evidence supplied by the respective parties, and having heard and considered the oral argument of counsel for the respective parties, is of the opinion that the motions should be denied.

It is accordingly, ORDERED, ADJUDGED and DECREED that HL&P's Motion and Supplemental Motion for Appropriate Relief in Aid of Fair Arbitration are denied.

Entered this 22 day of April, 1991.

/s/ Joseph B. Morris
JOSEPH B. MORRIS
Presiding Judge
101st Judicial District Court
Dallas County, Texas

APPENDIX C

Order of the Texas Court of Appeals at Dallas Denying Motion for Leave to File Petition for Writ of Mandamus

Order issued April 25, 1991

IN THE COURT OF APPEALS FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-91-00487-CV

HOUSTON LIGHTING AND POWER COMPANY,
Relator

v.

THE HONORABLE JOSEPH B. MORRIS, JUDGE,
Respondent

ORDER

Before Justices Stewart and Maloney

Relator's April 24, 1991 motion for leave to file petition for writ of mandamus is **DENIED.**

/s/ Frances Maloney
FRANCES MALONEY
Justice

APPENDIX D

Order of the Texas Supreme Court Overruling Motion for Leave to File Petition for Writ of Mandamus

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THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

June 19, 1991

RE: CASE NO. D-1033

STYLE: HOUSTON LIGHTING & POWER COMPANY
v. THE HONORABLE JOSEPH B. MORRIS, JUDGE

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for leave to file petition for writ of mandamus in the above styled case.

Sincerely,

JOHN T. ADAMS
Clerk

By Courtland Crocker
COURTLAND CROCKER
Deputy

cc: Honorable Joseph B. Morris

APPENDIX E

Order of the Texas Supreme Court Overruling Motion for Rehearing of Motion for Leave to File Petition for Writ of Mandamus

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THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

October 30, 1991

RE: CASE NO. D-1033

STYLE: HOUSTON LIGHTING & POWER COMPANY
v. THE HONORABLE JOSEPH B. MORRIS, JUDGE

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for rehearing of motion for leave to file petition for writ of mandamus in the above referenced case.

Sincerely,

JOHN T. ADAMS
Clerk

By Courtland Crocker
COURTLAND CROCKER
Deputy

cc: Honorable Joseph B. Morris

APPENDIX F

Excerpts from HL&P'S Motion for Appropriate Relief in Aid of Fair Arbitration

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IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
101ST JUDICIAL DISTRICT

No. 88-6923-E

HOUSTON LIGHTING AND POWER COMPANY,

v.

CITY OF SAN ANTONIO, *et al.*,

HOUSTON LIGHTING & POWER COMPANY'S MOTION FOR APPROPRIATE RELIEF IN AID OF FAIR ARBITRATION

TO THE HONORABLE JOSEPH B. MORRIS:

I. Relief Requested

Now comes Houston Lighting & Power Company ("HL&P") and, subject to its Motion for Reconsideration, requests the Court to grant appropriate relief in aid of fair arbitration including, *inter alia*, the entry of orders providing for the composition of the arbitration panel, the qualifications and method of selection of arbitrators, and related guidelines and procedures ensuring impartial decisions. The requested actions are necessary to provide for fair arbitration and comply with due process requirements.

* * * *

II. The Court Has Jurisdiction to Grant the Relief Requested

As a court of equity, this Court has jurisdiction to structure the arbitration process so as to establish the fundamental fairness required by due process of law. *Lipschutz v. Gutwirth*, 106 N.E.2d 8, 11 (N.Y. 1952) ("Undoubtedly the [court] in acting in arbitration matters does act as a court of equity — it applies equitable principles and enjoys a certain latitude of discretion."); *Belanger v. State Farm Mutual Auto. Ins.*, 426 N.Y.S.2d 140, 141 (3d App. Div. 1980). Moreover, the Texas General Arbitration Act (the "Texas Act") authorizes the Court to grant, in advance of any arbitration proceedings, any relief necessary to permit orderly arbitration to proceed. TEX. REV. CIV. STAT. ANN. art. 235, Section G(v). All parties agree that the Texas Act is applicable to the [Participation Agreement (the "PA")]. Even absent such agreement, the choice of law provision in Section 23 of the PA requires application of state law to all procedural aspects of the arbitration, although the Federal Arbitration Act also applies. *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford, Jr. University*, 109 S.Ct. 1248 (1989).

* * * *

III. Constitutional Due Process Considerations Require That Neutral Arbitrators Control the Arbitration

HL&P requests that the arbitration panel be structured so one or more Neutral Arbitrators effectively control the outcome; CPL and San Antonio apparently assert that the PA requires a panel of Party Representatives, numerically weighted in their favor, who are essentially advocates for each side of the dispute, surrogates for the parties themselves. The issue presented is identical to that decided in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), to wit: "whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration." The Supreme Court determined

that Congressional intent in enacting the Federal Arbitration Act was "to provide not merely for *any* arbitration but for an impartial one." *Id.* at 147. Thus, the Court concluded that "any tribunal permitted by law to try cases and controversies not only must be unbiased but must also avoid even the appearance of bias." *Id.* at 150. U.S. Const. amends. V & XIV.

* * * *

Agreements to arbitrate implicate due process both because the arbitrator acts in a quasi-judicial capacity and because the power of the state is used to compel arbitration and enforce the award. "The parties may agree to any form of dispute resolution that they wish, but they may not seek the backing of the courts for private actions that, while substituting for the judicial function, are fraught with the appearance of bias." *Barcon Assocs.* v. *Tri-County Asphalt Corp.*, 430 A.2d 214, 222 (N.J. 1981); *Graham* v. *Scissor-Tail, Inc.*, 623 P.2d 165, 174 (Cal. 1981) (en banc) (holding that the "potential bias said to arise from the composition of the arbitral body should preclude enforcement of a contractual provision requiring arbitration before it" because the "minimum levels of integrity" required by courts had not been met).

* * * *

APPENDIX G

Excerpts from the Texas General Arbitration Act, Tex. Rev. Civ. Stat. Ann. Art. 224 et seq.

Art. 224. Validity of arbitration agreements

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. A court shall refuse to enforce an agreement or contract provision to submit a controversy to arbitration if the court finds it was unconscionable at the time the agreement or contract was made.

* * * *

Art. 225. Proceedings to compel or stay arbitrations

Sec. A. On application of a party showing an agreement described in Article 224 of this Act, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration; but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party; otherwise, the application shall be denied.

See. B. On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

See. C. If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under Section A of Article 234 of this Act, the application shall be made therein. Otherwise and subject to Article 235 of this Act, the application may be made in any court of competent jurisdiction.

See. D. Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under the provisions of this Article 225, or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

See. E. An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

Art. 226. Appointment of arbitrators by court

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party setting forth the nature of the issues to be arbitrated and the qualifications of the proposed arbitrators shall appoint one or more qualified arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

* * * *

Art. 235. Applications to courts and the effect thereof; court proceedings on applications to courts; venue thereof; stay of proceedings in another court pursuant to a later

application; what the court may require that an application contain; when applications may be filed in advance of or pending or at or after the conclusion of arbitration proceedings; acquisition of jurisdiction over adverse parties by service of process or in rem by ancillary proceedings; court relief in aid of pending or prospective arbitration proceedings or the enforcement of court orders or decrees or satisfaction of court judgments; court hearings on applications.

* * * *

Sec. G. In advance of the institution of any arbitration proceedings, but in aid thereof, an application may be filed for order or orders to be entered by the court, including but not limited to applications:

* * * *

(v) seeking any other relief, which the court can grant in its discretion, needed to permit the orderly arbitration proceedings to be instituted and conducted and to prevent any improper interference or delay thereof.

* * * *

Art. 236. Confirmation of an award

Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Articles 237 and 238 of this Act.

Art. 237. Vacating an award

Sec. A. Upon application of a party, the court shall vacate an award where:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct or wilful misbehavior of any of the arbitrators prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Article 228, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Article 225 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

Sec. B. An application under this Article shall be made within ninety days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or should have been known.

Sec. C. In vacating the award on grounds other than stated in paragraph 5 of Section A of this Article, the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with the provisions of Article 226; or, if the award is vacated on grounds set forth in paragraphs 3 and 4 of Section A of this Article, the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with the provisions of Article 226. The time within which the

agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

Sec. D. If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

* * * *

APPENDIX H

Excerpts from the Federal Arbitration Act, 9 U.S.C. § 1 et seq.

* * * *

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

* * * *

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

* * * *

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of title 5.

* * * *

APPENDIX I

Excerpts from the South Texas Project Participation Agreement

1. PARTIES: The parties to this agreement are: CITY OF SAN ANTONIO, acting through the City Public Service Board of San Antonio, hereinafter referred to as "San Antonio"; CENTRAL POWER AND LIGHT COMPANY, a Texas corporation, hereinafter referred to as "Central"; HOUSTON LIGHTING & POWER COMPANY, a Texas corporation, hereinafter referred to as "Houston"; and the CITY OF AUSTIN, hereinafter referred to as "Austin".

2. RECITALS: The parties, having completed a feasibility study, desire to enter into this Participation Agreement providing for the licensing, construction, operation and maintenance of jointly owned and operated electric generation facilities to be known as the South Texas Project.

3. AGREEMENT: In consideration of the mutual covenants herein, the parties agree as follows:

* * * *

9. ADMINISTRATION:

9.1 As a means of securing effective cooperation and interchange of information and of providing consultation on a prompt and orderly basis among the Participants in connection with various administrative and technical problems which may arise from time to time in connection with the terms and conditions of this Participation Agreement, the Participants hereby establish the Management Committee.

9.2 The Management Committee shall be composed of one primary representative of each Participant, who shall be an officer or general manager of the Participant, and an alternate, both of

whom shall be designated by the Participant represented by written notice to all other Participants.

* * * *

9.4 All matters coming under the authority of the Management Committee shall be decided by agreement of the representatives of two or more Participants having in excess of sixty percent (60%) ownership interest in the Generating Unit or Units affected by the decision, except as otherwise specifically provided in this Participation Agreement. For the purposes of this Section 9.4 decisions affecting the Common Station Facilities or a portion of the Common Station Facilities shall be deemed to affect all Generating Units then served by the Common Station Facilities or portion thereof affected by the decision. All decisions reached by the Management Committee on matters concerning the South Texas Project and properly before the Management Committee for decision pursuant to the terms of this Participation Agreement shall be binding upon all Participants.

* * * *

14.2 Each Participant shall pay its share of construction costs in accordance with requests for funds submitted by the Project Manager.

* * * *

23. ARBITRATION:

23.1 If a dispute (other than as to a decision made under Section 9.4 hereof) between any of the Participants should arise under this Participation Agreement or the Project Agreements, any Participant may call for submission of the dispute to arbitration, which call shall be binding upon all other Participants. Except as specifically provided in this Participation Agreement or in the Project Agreements, the arbitration shall be governed by

the Texas General Arbitration Act of 1965, as same may be amended at the time of the call for arbitration. The costs and expenses of the arbitrators shall be shared equally by the Participants participating in the arbitration, unless otherwise decided by the arbitrators.

23.2 Any Participant calling for arbitration shall make such call by written notice to all other Participants, naming in such notice one arbitrator. Upon receipt of a written demand for arbitration, each additional Participant or combination of Participants having not less than fifteen percent (15%) Plant Ownership Interest if the dispute is not limited to matters relating to a single Generating Unit, or each Participant or combination of Participants having not less than a fifteen percent (15%) Generation Entitlement Share in the applicable Generating Unit if the dispute is limited to a single Generating Unit, may appoint one additional arbitrator. If necessary to make the total number of arbitrators an odd number, the arbitrators so appointed shall elect one additional arbitrator. The initial meeting of the arbitrators shall be at a place in Texas named by the Participant making the demand for arbitration. Thereafter, the arbitrators shall meet at such place or places in Texas as they deem appropriate. The decision of a majority of the arbitrators so appointed shall be binding on all Participants, and the Participants hereby consent to the entry of a judgment in any court of competent jurisdiction confirming and implementing the decision of the arbitrators.

* * * *

APPENDIX J

Excerpts from the American Bar Association Code of Ethics for Arbitrators in Commercial Disputes

* * * *

CANON VII.
ETHICAL CONSIDERATIONS RELATING TO ARBITRATORS APPOINTED BY ONE PARTY

Introductory Note:

In some types of arbitration in which there are three arbitrators it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed either by agreement of the parties or of the two arbitrators, or, failing such agreement, by an independent institution or individual. In some of these types of arbitration, all three arbitrators are customarily considered to be neutral and are expected to observe the same standards of ethical conduct. However, there are also many types of tripartite arbitration in which it has been the practice that the two arbitrators appointed by the parties are not considered to be neutral and are expected to observe many — but not all — of the same ethical standards as the neutral third arbitrator. For the purposes of this Code, an arbitrator appointed by one party who is not expected to observe all of the same standards as the third arbitrator is referred to as a "non-neutral arbitrator." This Canon VII describes the ethical obligations which non-neutral party-appointed arbitrators should observe and those which are not applicable to them.

In all arbitrations in which there are two or more party-appointed arbitrators, it is important for every one concerned to know from the start whether the party-appointed arbitrators are expected to be neutrals or non-neutrals. In such arbitrations, the two party-appointed arbitrators should be considered non-neutrals

unless both parties inform the arbitrators that all three arbitrators are to be neutral, or unless the contract, the applicable arbitration rules, or any governing law requires that all three arbitrators are to be neutral.

It should be noted that in cases where the arbitration is conducted outside the United States the applicable law may require that all arbitrators be neutral. Accordingly, in such cases the governing law should be considered before applying any of the following provisions relating to non-neutral party-appointed arbitrators.

A. Obligations Under Canon I:

Non-neutral party-appointed arbitrators should observe all of the obligations of Canon I to uphold the integrity and fairness of the arbitration process, subject only to the following provisions:

(1) Non-neutral arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, non-neutral arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators.

(2) The provisions of Canon I-D relating to relationships and interests are not applicable to non-neutral arbitrators.

B. Obligations Under Canon II:

Non-neutral party-appointed arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the non-neutral arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any bias which may exist

or appear to exist. However, this obligation is subject to the following provisions:

(1) Disclosure by non-neutral arbitrators should be sufficient to describe the general nature and scope of any interest or relationship, but need not include as detailed information as is expected from persons appointed as neutral arbitrators.

(2) Non-neutral arbitrators are not obligated to withdraw if requested to do so by the party who did not appoint them, notwithstanding the provisions of Canon II-E.

C. Obligations Under Canon III:

Non-neutral party-appointed arbitrators should observe all of the obligations of Canon III concerning communications with the parties, subject only to the following provisions:

(1) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, non-neutral arbitrators may consult with the party who appointed them concerning the acceptability of persons under consideration for appointment as the third arbitrator.

(2) Non-neutral arbitrators may communicate with the party who appointed them concerning any other aspect of the case, provided they first inform the other arbitrators and the parties that they intend to do so. If such communication occurred prior to the time the person was appointed as arbitrator, or prior to the first hearing or other meeting of the parties with the arbitrators, the non-neutral arbitrator should at the first hearing or meeting, disclose the fact that such communication has taken place. In complying with the provisions of this paragraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. It is also sufficient to disclose at any time the intention to follow

the procedure of having such communications in the future and there is no requirement thereafter that there be disclosure before each separate occasion on which such a communication occurs.

(3) When non-neutral arbitrators communicate in writing with the party who appointed them concerning any matter as to which communication is permitted under this Code, they are not required to send copies of any such written communications to any other party or arbitrator.

D. Obligations Under Canon IV:

Non-neutral party-appointed arbitrators should observe all of the obligations of Canon IV to conduct the proceedings fairly and diligently.

E. Obligations Under Canon V:

Non-neutral party-appointed arbitrators should observe all of the obligations of Canon V concerning making decisions, subject only to the following provision:

(1) Non-neutral arbitrators are permitted to be predisposed toward deciding in favor of the party who appointed them.

F. Obligations Under Canon VI:

Non-neutral party-appointed arbitrators should observe all of the obligations of Canon VI to be faithful to the relationship of trust inherent in the office of arbitrator, subject only to the following provision:

(1) Non-neutral arbitrators are not subject to the provisions of Canon VI-D with respect to any payments by the party who appointed them.

APPENDIX K

Excerpts from the American Arbitration Association Commercial Arbitration Rules

* * * *

12. Qualifications of an Arbitrator

Any neutral arbitrator appointed pursuant to Section 13, 14, 15, or 54, or selected by mutual choice of the parties or their appointees, shall be subject to disqualification for the reasons specified in Section 19. If the parties specifically so agree in writing, the arbitrator shall not be subject to disqualification for those reasons.

Unless the parties agree otherwise, an arbitrator selected unilaterally by one party is a party-appointed arbitrator and is not subject to disqualification pursuant to Section 19.

The term "arbitrator" in these rules refers to the arbitration panel, whether composed of one or more arbitrators and whether the arbitrators are neutral or party appointed.

* * * *

19. Disclosure and Challenge Procedure

Any person appointed as neutral arbitrator shall disclose to the AAA any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others. Upon objection of a party to the continued service of a neutral arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

* * * *

APPENDIX L

Form of Neutrality Oath Taken by Arbitrators for CPL, San Antonio and Austin

STATE OF TEXAS }
COUNTY OF }

. . . . . , being duly sworn, hereby accepts this appointment as a neutral arbitrator and will faithfully, fairly and impartially hear and examine the matters in controversy between the above-named parties, in accordance with their arbitration agreement and the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, and will make a just award according to the best of his understanding.

Dated: . . . ., 1990.

Signed: _____
ARBITRATOR

SUBSCRIBED AND SWORN TO BEFORE ME, on this the . . . day of . . . ., 1990, to certify which witness my hand and seal of office.

_____
Notary Public, State of Texas

APPENDIX M

Affidavit of Neil A. Eisner

IN THE DISTRICT COURT
OF DALLAS COUNTY, TEXAS
101ST JUDICIAL DISTRICT

No. 88-6923-E

HOUSTON LIGHTING AND POWER COMPANY,
v.
CITY OF SAN ANTONIO, *et al.*,

AFFIDAVIT OF NEIL A. EISNER

STATE OF TEXAS }
COUNTY OF TRAVIS }

Neil A. Eisner, being duly sworn, deposes and says:

Qualification of Witness

1. My name is Neil A. Eisner. Attached as Exhibit A is my *résumé*. In addition to the information in my *résumé*, following receipt of my law degree I practiced law for four years and I have remained a member in good standing of the New York bar. I have spent most of my life specializing in municipal utilities and in the financing of major generation and transmission projects, particularly for municipal entities located in Texas and have spent considerable time studying and analyzing the electric utility systems of both Austin and San Antonio. My education and experience have given me qualifications in the area of municipal and corporate utility finance and underlying security agreements, such as ordinances and trust indentures, utilized in securing financing.

Purpose of Affidavit and Conclusion Reached

2. I have been asked by attorneys for Houston Lighting & Power Company ("HL&P") to review certain data and to make a determination concerning the pecuniary effect upon [arbitrators] Mr. Fred Shannon and Mr. Harold Scherr of a substantial recovery by City Public Service Board of San Antonio (CPS) against Houston Lighting & Power Company. Assuming that CPS successfully asserts a claim against HL&P similar in nature to that asserted by City of Austin, I have concluded that the direct, pecuniary benefits to Mr. Shannon and Mr. Scherr would be as follows:

Mr. Fred Shannon

2/89 - 1/90 Electric Bill	$1,627.11	
2/89 - 1/90 kWh	24,336	
	Low	High
Direct Pecuniary Benefit	$4,164.82	$6,863.37
Present Value of the Benefit	$1,943.32	$3,202.47

Mr. Harold Scherr

2/89 - 1/90 Electric Bill	$1,594.76	
2/89 - 1/90 kWh	24,168	
	Low	High
Direct Pecuniary Benefit	$4,136.07	$6,815.99
Present Value of the Benefit	$1,929.90	$3,180.36

Method of Making Computation

3. The computation which I performed was as follows. By reviewing the testimony of Mr. Robert Gross and the exhibit he sponsored in the case of *City of Austin v. Houston Lighting & Power Company*, I have determined that the City of Austin, based on its sixteen percent ownership interest in the South Texas Project, claimed damages against HL&P in the range of $534 million to $880 million dollars. I have assumed that CPS

would assert similar claims but that the figures would be larger because CPS's interest in the South Texas Project is twenty-eight percent rather than sixteen percent. Applying this assumption, CPS's claims would be in the range of $935 million to $1.540 billion.

4. The electric usage of Mr. Shannon and Mr. Scherr was determined from data supplied by CPS. *See* Exhibit C.

5. From the CPS 1989-1990 Annual Report I have determined that CPS sold 11.703 billion kilowatt hours in the period February 1989 through January 1990, and that the usage of Mr. Shannon and Mr. Scherr in the same period constituted .000208 and .000207 percent, respectively, of the total kilowatt hours sold. Applying these percentages to the total damages produces the range of the "Present Value of the Benefit" figures set forth in paragraph 2. These amounts represent the *minimum* current cash value of the benefits that would be received over a period of years regardless of the manner in which the funds were spent so long as they were invested in a responsible and rational manner to benefit the utility system.

6. The "Direct Pecuniary Benefit" amounts in paragraph 2 assume that the recovery is used by CPS to reduce outstanding debt. These benefits would accrue over a period of years in the form of lower electric rates.

Benefits From Litigation Are Benefits to CPS Ratepayers

7. I have reviewed the Trust Indenture of the City of San Antonio, Texas, dated February 1, 1951, which grants to a Trustee for those institutions which own the City of San Antonio's Electric and Gas Systems Old Series Bonds a security interest in all the properties and revenues of San Antonio's Electric and Gas Systems. I have also reviewed the terms of the ordinance securing the New Series Bonds. Based on a lifetime of experience interpreting documents of this nature and the relation-

ships which they create, it is clear that any recovery by CPS against HL&P arising from alleged breaches of the South Texas Project Participation Agreement would of necessity remain within the City of San Antonio Electric and Gas Systems for the benefit of its creditors and ratepayers and that such recovery could be used only to benefit the ratepayers who have borne the expense and risk of STP and who are ultimately obligated to discharge the indebtedness incurred to build STP.

Documents Relied Upon

8. In performing the computations upon which this affidavit is based I have reviewed and relied upon the documents listed in Exhibit B. These documents are the type of documents reasonably relied upon by experts in my field of specialty in making studies about and drawing conclusions concerning municipal utilities and their ratepayers.

/s/ Neil A. Eisner
NEIL A. EISNER

SWORN TO AND SUBSCRIBED BEFORE ME, this 15th day of January, 1991.

KATHLEEN HARRISON
Notary Public, State of Texas

KATHLEEN HARRISON
Notary Public, State of Texas
My Commission Expires
Dec. 20, 1993